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How reasonable a private investor can be assumed to be? *Corsica Ferries France*

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I. Introduction

The test used by the European Commission to determine whether a state investment is to be classified as a State aid within the meaning of Article 107(1) TFEU, is whether a private investor of comparable size would have undertaken the same investment in similar circumstances. This is commonly referred to as the market economy investor test (“MEIT” or “private investor test”). It requires the Commission to identify the behaviour of a hypothetical private actor, in a reasoned way, on the basis of generally accepted methodologies.¹ To this end, the Commission enjoys wide discretionary powers. The European Courts carry out a mere limited review of its assessment.² However, this approach sits uncomfortably with the fact that the notion of State aid is an objective legal concept upon which Member States must be able to rely.³ This is arguably the reason why the recent case law has attempted to frame the discretion of the Commission, by identifying both the procedural steps to be followed and the type of factors to be taken into account when making the MEIT assessment. The rulings delivered by the European Courts in *Corsica Ferries*⁴ should be seen against this background. Called to rule on the application of the private investor test to transactions made by large

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¹ Draft Commission Notice on the Notion of State aid pursuant to Article 107(1) TFEU available at http://ec.europa.eu/competition/consultations/2014_state_aid_notion/draft_guidance_en.pdf (last visited January 2015).

² See, *inter alia*, Case T-196/04, *Ryanair Ltd. v. Commission*, EU:T:2008:585, para 41; Case C-341/06 P & C-342/06 P, *Chronopost SA and La Poste v. UFEX et al.*, EU:C:2008:375, para 143; Joined Cases C-328/99 & C-399/00, *Italy and SIM v. Commission*, EU:C:2003:252, para 39; Joined Cases T-126/96 & 127/96, *BFM and EFIM v. Commission*, EU:T:1998:207, para 81; Case C-56/93, *Belgium v. Commission*, EU:C:1996:64, para 10 et seq.

³ See, in particular, Case T-67/94, *Ladbroke Racing v. Commission*, EU:T:1998:7.

⁴ Case T-565/08, *Corsica Ferries France SAS v. Commission*, EU:T:2012:415, upheld by the Court of Justice in Case C-533/12 P, *SNCM SA and French Republic v. Corsica Ferries France SA*, EU:C:2014:2142.

group of companies with a view to achieve profits in the long term, the General Court endeavoured to provide a legal framework for ascertaining whether those transactions fulfil the private investor test. But there is more. In making this evaluation the General Court added that the Commission is not bound to confine itself to appreciate reasons of profitability triggering the state intervention. Under certain conditions, account may be taken of whether the conduct of the State has been influenced by social, regional-development or environmental concerns. Considering the two-tier structure of State aid control, where the non-economic concerns are only relevant at the stage of compatibility, this finding is very likely to sound almost profane. The Court of Justice chooses not to deal with this point of law on appeal – while rejecting the general applicability of the legal framework created by the lower instance court. Nonetheless, it is submitted that the reasoning unfolded by the General Court should be kept in the highest regard. The question as to whether the renewed balance between the economic and social dimension of European integration, struck by the Lisbon Treaty, should prompt a shift from the traditional private investor to a new private actor, who also considers non-economic factors when taking business decisions deserves great attention.

II. The factual and legal background to the dispute

In 2002, the French Republic notified the European Commission of a plan to grant aid to Société Nationale Corse-Méditerranée (“SNCM”) in an amount of EUR 76 million. The aid beneficiary, a French maritime company, which provides regular crossings to Corsica from continental France, was, at that time, held by two state-owned companies, namely Société nationale des chemins de fer and Compagnie générale maritime et financière (“CGMF”). One year later, the Commission adopted a decision approving, with conditions attached, the full amount of the aid⁵ under the Community Guidelines for rescuing and restructuring firms in difficulty.⁶ However, the decision of the Commission was subsequently struck down by the General Court on the ground that the condition stipulated in the Guidelines, that the aid must be limited to the minimum needed to enable the restructuring to be undertaken, was not fulfilled.⁷ In 2006, the Commission authorised a merger consisting of the acquisition of joint control of SNCM by two private operators, Butler Capital Partners and Veolia Transport, through the purchase of approximately 75% of SNCM’s capital (while CGMF maintained a presence with a 25% shareholding). The terms of that transaction required the French Republic to implement the following measures: (i) the sale of SNCM at a negative price of EUR 158 million, by means of a capital contribution of EUR 142.5 million and payment of the costs of mutual benefit societies in the amount of EUR 15.5 million; (ii) the current account advance in the amount of EUR 38.5 million, aimed at financing a possible social plan put in place by the purchasers; and (iii) the increase in capital of EUR 8.75 million, to which CGMF had to subscribe jointly with the EUR 26.25 million contributed by Butler Capital

⁵ 2004/166/EC: Commission Decision of 9 July 2003 on aid which France intends to grant for the restructuring of Société Nationale Maritime Corse-Méditerranée (SNCM) [OJ L61, 27.2.2004, p. 13-65]

⁶ Communication of the Commission – Community guidelines on State aid for rescuing and restructuring of firms in difficulty [OJ C244, 1.10.2004, p. 2-17]

⁷ Case T-349/03, *Corsica Ferries France v Commission*, EU:T:2005:221.

Partners and Veolia Transport. In its decision of 8 July 2008,⁸ the Commission considered the legality of both the capital investment made by CGMF in SNCM in 2002 and the measures adopted by the French State in the context of the privatisation of SNCM. As to the first measure, the Commission concluded that it constituted unlawful State aid; in particular, EUR 53.48 million of that investment was declared compatible with the internal market as public service compensation under Article 106(2) TFEU and EUR 15.81 million was cleared as restructuring aid under Article 107(3)(c) TFEU. As regards the measures taken in connection with SNCM's privatisation, the Commission held that they did not amount to State aid within the meaning of Article 107(1) TFEU. Corsica Ferries SAS, SNCM's main competitor, brought an action before the General Court seeking annulment of the Commission's decision. The present contribution will focus on the main legal issue, namely the application of the market economy investor test to the sale of SNCM at a negative price of EUR 158 million.

III. The ruling of the General Court

In its 2012 ruling, the General Court took the view that the Commission had erred in law in finding that the measures aimed at the recapitalisation and sale of SNCM did not constitute State aid. With regard to the sale of SNCM at a negative price of EUR 158 million, the General Court first reiterated that the test to be applied by the Commission is whether, in similar circumstances, a private investor could have been led to make such large capital investments in the context of the sale of the undertaking, or would the investor rather have opted to liquidate it.⁹ In carrying out the test, the Commission had included in the hypothetical overall costs of liquidation the amount of the additional redundancy payments, which were not due to the employees under statutory obligations or obligations linked to the privatisation agreements. The General Court acknowledged that the payment of additional redundancy benefits may constitute a legitimate practice, depending on the specific circumstances of the case, with a view to fostering peaceful social dialogue and safeguarding the company's brand image. As a result, those payments would fall within the range of costs that may be lawfully included when assessing a State's conduct under the lens of the MEIT. However, in the absence of an economic rationale, even in the long term, taking into account costs exceeding the strict legal and contractual obligations of SNCM, must be regarded as a State aid.¹⁰ According to the General Court, the Commission had failed to define in its decision, particularly at the geographical and sectoral level, the economic activities of the French State against which the long-term economic rationale behind France's conduct had to be assessed.¹¹ In addition, the Commission had not provided sufficient objective and verifiable evidence to show that the payment of additional redundancy benefits constituted a well-established practice among the reference private investors (i.e. large groups of undertakings). Nor had the Commission evidenced that the conduct of the French State was motivated by a reasonable and sufficient probability of obtaining an indirect material benefit,

⁸ 2009/611/EC: Commission Decision of 8 July 2008 concerning the measure C 58/02 (ex N 118/02) which France has implemented in favour of Société Nationale Maritime Corse-Méditerranée (SNCM) [OJ L225, 27.8.2009, p. 180-237]

⁹ Ibid., para 78.

¹⁰ Ibid., para 84.

¹¹ Ibid., para 86.

even in the long term.¹² Having regard to those findings, the General Court partially struck down the decision of the Commission.

SNCM and the French Republic, brought an action for annulment against this ruling. The classification of the sale of SNCM at a negative price of EUR 158 million as a State aid, was heavily contested by the applicants. In particular, they criticised the General Court for having, in connection with the interpretation and application of the MEIT, established a “wholly judge-made test” requiring the Commission to: (i) carry out a sectoral and geographical analysis; (ii) demonstrate a sufficiently well-established practice; and (iii) satisfy an excessively high standard of proof in order to establish the existence of a probability of an indirect material benefit. In respect of the latter, even a summary reference to the protection of the brand image of the Member State concerned as a global investor in a market economy should undoubtedly have been considered, according to the applicants, as a legitimate indirect material benefit.

IV. Advocate General’s Opinion

Advocate General Wathelet delivered his Opinion on 15th January 2014.¹³ He carefully examined the General Court’s classification of the sale of SNCM as State aid, focusing on the requirements laid down by the appealed judgment for a correct application of the private investor test. As regards the definition of the economic activities of the State at the geographic and sectoral level, the Advocate General firstly made clear that the existing case law did not prevent the General Court from holding that such an analysis could be relevant for the purpose of evaluating the long-term economic rationale of the State’s behaviour.¹⁴ In particular, the judgment relied on by the applicant, in which the Court of Justice held that the MEIT involves the assessment “*whether, in similar circumstances, a private investor of a dimension comparable to that of the bodies managing the public sector could have been prevailed upon to make capital contributions of the same size*”,¹⁵ would conversely validate the finding of the General Court.¹⁶ If the reference private investor must be of a comparable dimension to the State, a definition of the activities of the State at the geographical and sectoral level would be unquestionably helpful to identify such a private investor.¹⁷ Furthermore, the General Court had not ruled out the possibility of taking other elements into consideration, alongside the sectoral and geographical dimension of State’s economic activities.¹⁸

Concerning the obligation to demonstrate that the payment of additional redundancy benefits amounts to a “well-established practice” among the reference private investors, the Advocate General opined that the General Court had not introduced a new requirement going beyond what is necessary for the application of the MEIT. He recalled that the additional redundancy payments must be assessed with a view to determining whether the cost of winding up

¹² Ibid., para 87.

¹³ Advocate General Wathelet’s Opinion in Case C-533/12 P, *Société nationale maritime Corse-Méditerranée SA and French Republic v Corsica Ferries France SAS*, EU:C:2014:4.

¹⁴ Ibid., para 45.

¹⁵ *SIM 2 Multimedia v Commission*, cited *supra*, note 2, para 38.

¹⁶ Ibid., para 46.

¹⁷ Ibid., para 47.

¹⁸ As it would be proved by the use of the words “*in particular*”. See para 44.

SNCM would exceed the cost of disposing of it at a negative price of EUR 158 million; or, in other words, whether a private investor in similar circumstances would have gone ahead with that disposal.¹⁹ Thus, there would be a need to ascertain whether the cost of liquidation includes such additional payments. Since they were not imposed by law or collective agreements, the only possible MEIT-compliant reason for including them in the overall hypothetical cost of liquidation, would be that this was a sufficiently established practice. It would not be sufficient to demonstrate that only one private company made those payments in similar circumstances.²⁰

The complaint of the appellants, that “the reasonable probability of obtaining an indirect material profit” required by the European judges amounted to an excessive burden of proof on the Commission, was not accepted by the Advocate General either. In his view, that requirement did not imply the obligation to precisely quantify the damage suffered in the event of the deterioration of the CGMF or French State’s brand image. Rather, it had to be construed as requiring the Commission to merely explain the nature of the damage at issue, and specify the stakeholders in relation to whom the brand image of those public actors would be affected.²¹ The Advocate General specified further that, although the General Court had required the existence of “specific circumstances and a particularly cogent reason”, it had never denied that the protection of the brand image of a Member State, as a global investor in a market economy, could in principle constitute a sufficient justification for the long-term rationale of a State’s conduct. This finding of the General Court would also be in line with the previous pronouncements of the European jurisdictions.²² In any event, the protection of the brand image of the State could not be invoked by CGMF in the case at hand, given that the latter had no other asset in the maritime transport sector.²³ Therefore, he proposed that the Court of Justice dismiss the appeal in its entirety.

V. The ruling of the Court of Justice

The Court of Justice began by recalling the basic principles underlying the application of the private investor test. First of all, this test implies an assessment as to whether the measure would have been adopted in normal market conditions, by a private company, in a situation as close as possible to that of the Member State concerned. Where it is not possible to compare the situation of a public body with that of a private company, “normal market conditions” must be assessed by referring to the available “objective” and “verifiable” elements.²⁴ The General Court had concluded that it is for the Commission to circumscribe the geographic and sectoral economic activities of the Member State, in relation to which the reasonable probability for that State to obtain an indirect material profit in the long term has to be assessed.²⁵ Furthermore, only a “sufficiently well-established practice” of the reference private investors can be used to apply the MEIT. However, the Court makes clear that these

¹⁹ Ibid., para 52.

²⁰ Ibid., paras 53-56.

²¹ Ibid., para 66.

²² Ibid., paras 76-79.

²³ Ibid., para 91.

²⁴ Ibid., para 34.

²⁵ Ibid., para 35.

requirements must not be considered absolute, their legitimacy being confined to cases where factual backgrounds are comparable to the case at hand.²⁶ As long as the General Court did not mean to impose generally applicable requirements with regard to the nature of the evidence necessary to demonstrate that the private investor test is met, the appellants were wrong to argue that the standard of proof set out under the first instance jurisdiction goes beyond what is necessary for a proper application of the MEIT.²⁷ In the Court's view, the General Court was not in a position to review the long-term economic rationale of the negative sale price at issue, without a clear definition of the French State's economic activities to which that rationale referred. The General Court did not even rule out, as a matter of principle, that the protection of the image of the State as a global investor in a market economy cannot constitute the justification for that economic rationale; summary references to it are nonetheless insufficient to endorse the point of law raised by the appellants.²⁸ In addition, a "reasonable probability" of obtaining a material benefit is a fair standard of proof, to the extent that the mere statement that the brand image of the French State would be affected by social disorders is not enough to support a finding of no aid.²⁹

Having also refuted the criticism that the General Court failed to fulfil its obligation to state reasons, in that it did not define the terms "sufficiently established practice" and "settled practice" by deciding that those terms are clear and refer to a factual assessment,³⁰ the Court of Justice sided with the General Court and dismissed this ground of appeal. Following an attentive analysis of the other pleas, the Court of Justice rejected the entire appeal.

VI. Analysis

The main legal question is whether, and to what extent, it is legitimate to take into account non-economic considerations - such as the avoidance of social disorder and the promotion of social dialogue - for the purpose of the application of the private investor test.³¹ This issue was first considered in *Meura*, where the Court of Justice found that the assessment of a State's conduct must be carried out "having regard to the foreseeability of obtaining a return and *leaving aside all social, regional-policy and sectoral considerations*".³² In *Hytasa*, the Court built on its former precedent by making clear that only the obligations that the State must assume as a shareholder - to the exclusion of those incumbent on the State as a public authority - fall within the scope of the MEIT.³³ Two later judgments discussed whether, in certain circumstances, a different range of considerations should be regarded as relevant when applying the MEIT. In *Alfa Romeo*, the Court recognised that the evaluations carried out with a view to making an investment by holdings or groups of undertakings are inherently different from the ones made by ordinary investors; the content of the private investor test

²⁶ Ibid., para 36.

²⁷ Ibid., para 37.

²⁸ Ibid., paras 40-41.

²⁹ Ibid., para 42.

³⁰ Ibid., para 45.

³¹ To be accurate, what is applied in the case at hand is a variation of the private investor test, that is the "private vendor test". In this regard, see Draft Notice, cited *supra* note 1, para 77.

³² Case 234/84, *Commission v. Belgium*, EU:C:1986:32, para 14.

³³ Joined Cases C-278/92, C-279/92 and C-280/92, *Spain v. Commission*, EU:C:1994:325, para 22.

should reflect the different motivations that inspire the conduct of the former actors.³⁴ This distinction was then codified by the Commission in what is still the fundamental text for the MEIT, namely the 1993 Commission Communication to the Member States (“the 1993 Communication”).³⁵ The Court elaborated on this finding in *ENI-Lanerossi* by accepting that a parent company may bear the losses of one subsidiary for a limited period in order to enable it to cease business under the best possible conditions and, in so doing, “*it may be motivated not solely by the likelihood of an indirect material profit but also by other considerations, such as the desire to protect the group’s image or to redirect its activities*”.³⁶ Non-economic concerns thus seem to find a place in the private investor test as applicable to holdings and groups of undertakings pursuing a structural policy, on the condition that those concerns are ultimately functional to the pursuit of profitability. In the case under consideration, the European judges have been called to confirm this principled finding as well as to elaborate further on the content of that test. The groundbreaking potential of the General Court’s response has remained on the cards, as the Court of Justice appears to refuse to extend the findings of its court of first instance beyond the boundaries of the specific factual background of the case at hand. And it is indeed from those findings that this comment will start its analysis (6.1), before moving to assessment of the appeal ruling (6.2).

6.1. *The reasonable private investor test and its framework of analysis*

The General Court made clear that the benchmark against which the French State’s conduct ought to be assessed is the “reasonable private investor”.³⁷ This concept closely resembles the notion of “reasonable investor” expounded by Advocate General Van Gerven in *Alfa Romeo*.³⁸ The latter notion would include, alongside the ordinary investors, a second category of economic operators, such as holding companies, which either own controlling participations or wish to acquire them (“stable investors”). These investors would be guided by considerations of profitability over a longer period of time than the ordinary investors and, in so doing, would also take into account “*considerations of employment and economic development in a given region or sector*”. Likewise, the reasonable investor portrayed by the General Court would not disregard either “*its responsibility towards the stakeholders in the company*” or “*the development of the social, economic and environmental context in which it*

³⁴ Case C-305/89, *Italy v. Commission*, EU:C:1991:142, para 20.

³⁵ Commission Communication to the Member States on the Application of Article 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector [OJ C 307, 12.10.1993, p. 3]. See, in particular, para 30: “*The Commission is also aware of the differences in approach a market economy investor may have between his minority holdings in the company on the one hand and full control of large group on the other hand. The former relationship may often be characterised as more as a speculative or even short-term interest, whereas the latter usually implies a longer-term interest. Therefore where the public controls an individual public undertaking or group of undertakings it will normally be less motivated by purely short-term profit considerations than if it had merely a minority/non-controlling holding and its time horizon will accordingly be longer. The Commission will take account of the nature of the public authorities’ holding in comparing their behaviour with the benchmark of the equivalent market economy investor*”. For the sake of completeness, it should be reminded that this communication is included among the acts which should be repealed once the Draft Commission Notice on the Notion of Aid pursuant to Article 107(1) TFEU will be adopted. In this regard, see para 198 of the Draft Notice, cited *supra* note 4.

³⁶ Case C-303/88, *Italy v. Commission*, EU:C:1991:136, para 21.

³⁷ General Court Judgment, para 82.

³⁸ Advocate General Van Gerven’s Opinion in Case C-305/89, *Italy v. Commission*, EU:C:1991:142, para 11.

continues to develop". However, as Advocate General Van Gerven's reasonable investor test was dismissed by the Court of Justice in *Alfa Romeo*, one is naturally led to wonder what prompted the General Court to endorse a test of equivalent content in the case at issue. The reason, as is suggested by the ruling, lies in the substantial strengthening of the social dimension of European integration resulting from the changes introduced by the Treaty of Lisbon. What is being suggested is not that the gap between the economic and the social dimension has been bridged, but merely that the inclusion among EU objectives of "a highly competitive *social market economy*" (Article 3(3) TEU),³⁹ together with the introduction of the "horizontal social clause" (Article 9 TFEU) and the reappraisal of service of general interest by a new EU competence, points at a renewed significance for the latter. In this context,⁴⁰ the benchmark of legitimacy of state conduct cannot merely be a private actor acting in accordance with his own short-term economic self-interest. On the contrary, that private benchmark should be construed as also factoring in non-economic concerns, such as social, environmental or regional-development considerations, as long as the ultimate aim is to achieve profits in the longer term. The existence of an actual intent to secure profitability ensures that the reasonable private investor is not at odds with "the system ensuring that competition is not distorted", which must be preserved, as part of the internal market, pursuant to Protocol No. 27 to the Treaties.⁴¹ After all, is not this what happens in economic reality? When deciding whether to enter into a given transaction, private holdings (or large private groups of companies) are heavily influenced by non-economic concerns, on the basis that those concerns are functional to the achievement of profits in the longer term.

The General Court did not confine itself to shaping the substantive content of the test; it also attempted to provide the reasonable private investor test with a comprehensive framework of analysis. The two layers of this framework are: (a) the definition of the economic activities targeted by the public measure; and (b) the assessment of the long-term economic rationale of a state's conduct.

6.1.1. The definition of the size of the comparable private actors

First of all, the Commission is required to define the economic activities of the State in relation to which the long-term rationale of the public measure under consideration has to be assessed. The boundaries of those activities should be drawn mainly through a geographic

³⁹ Article 3(3) reads as follows: "*The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high protection and improvement of the quality of the environment. It shall promote scientific and technological advance*".

⁴⁰ For two interesting contributions concerning the impact of the revision made by the Lisbon Treaty on the application of the internal market rules, see S. Václav, *CJEU and the Social Market Economic Goal of the EU*, Charles University in Prague Faculty of Law Research Paper No. 2014/I/1, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2513377 (last visited 14 January 2015) and D. Damjanovic, *The EU market rules as social rules: why the EU can be a social market economy*, 50 CML Rev. (2013), 1685-1717.

⁴¹ Protocol No. 27 on the Internal Market and Competition states: "*The High Contracting Parties, considering that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted, have agreed that: to this end the Union shall, if necessary, take action under the provisions of the Treaties, including Article 352 of the Treaty on the Functioning of the European Union*".

and sectoral analysis.⁴² This allows the Commission to identify the size of the private actors to which the conduct of the State has to be compared.

6.1.2. The assessment of the long-term economic rationale of the State conduct

Secondly, the short-term non-economic concern underlying the public measure at issue must be identified by the Commission. Avoiding social disorders and fostering a calm social dialogue is, for instance, the (legitimate) short-term concern that triggered the adoption of the measure by the French State in the case at hand. In this regard, it is particularly striking that those concerns fit perfectly with the overall objectives of the cohesion policy pursued in the framework of the EU2020 strategy.⁴³ This remark leads us to initially conclude: whenever the non-economic concerns at stake are in line with the European interest, objections are not likely to be raised by the European courts.

In order to establish whether the state's conduct reflects a long-term economic rationale, the Commission must determine whether the enactment of the public measure concerned is a "well-established practice" among the reference private actors. An affirmative conclusion must be based on sufficient, objective and verifiable data. In particular, instances of measures taken by those private actors, preferably related to the same type of transaction and the same sector, are good evidence of such practice.⁴⁴ If the existence of a well-established practice cannot be substantiated, it must be proved that a State's conduct was motivated by a "reasonable probability" of obtaining a material benefit in the longer term.⁴⁵ To that end, the nature of the damage prevented through the adoption of the measure concerned must be explained and the stakeholders (users, clients, suppliers or staff) in relation to whom the damage would occur must be singled out.⁴⁶ The long-term economic rationale of a State's conduct is generally not demonstrated to the requisite legal standard by, for instance, a summary reference to the protection of the brand image of the State as a global investor in the market economy.⁴⁷ Once the would-be damage has been established and quantified,⁴⁸ it is for the Commission to compare this amount to the costs arising from the State measure concerned. Should the latter be lower than the former, the reasonable private investor test will be fulfilled.

⁴² As noted by Advocate General Wathelet in his Opinion, para 44, the use of the wording "in particular" by the General Court reveals that the Commission is not prevented from making recourse to other factors as well.

⁴³ In this regard, see "An Introduction to EU Cohesion Policy 2014-2020" (June 2014), available at http://ec.europa.eu/regional_policy/sources/docgener/informat/basic/basic_2014_en.pdf (last visited 14 January).

⁴⁴ General Court Judgment, para 97.

⁴⁵ General Court Judgment, para 101.

⁴⁶ General Court Judgment, para 102.

⁴⁷ General Court Judgment, para 85.

⁴⁸ General Court Judgment, para 102. According to the General Court, the decision of the Commission contained "*no factor which has the effect of demonstrating that the Commission attempted to quantify the damage suffered, damage which must, however, necessarily be compared with the estimated costs of the additional redundancy payments for which it constitutes the justification*". The quantification of the indirect economic benefit pursued by the state measure concerned is therefore an inescapable step of the assessment. In particular, the General Court clarified that what the Commission is requested to evaluate are "*the scale of the indirect social costs and the probability of their being incurred*" (para 108). The conclusion of the Advocate General Wathelet that the General Court did not impose an excessive burden of proof on the Commission as it did not request a "*precise quantification*" of the damage suffered should be read accordingly; see para 67 of the Opinion.

6.2. The view of the Court of Justice

First of all, the Court of Justice does not elucidate on the question of the relevance of non-economic concerns within the private investor test. The prevailing impression is that those concerns into account is regarded as legitimate in principle. The assumption of the General Court, that the strengthening of the social dimension of European integration would carry the potential of prompting a shift from the traditional paradigm of private investor⁴⁹ to the reasonable private investor, is not examined. Admittedly, the problem of its compliance with well-settled case law on the objective notion of State aid may only be disentangled through the creation of an appropriate framework of analysis. On this issue, the Court of Justice is called on to decide whether the main elements of the framework of the reasonable investor test outlined by the General Court (i.e. definition of the economic activities targeted by the State measure, demonstration of a “well-established practice” and a “reasonable probability of obtaining a long-term material benefit”) are such as to impose a burden of proof beyond what is necessary for a proper application of the MEIT. The appeal jurisdiction was thus given the opportunity to provide concrete content to the test to be applied to the conduct of reasonable investors, that is to say public holding companies and public groups of undertakings pursuing a general or sectoral structural policy, and guided by prospects of profitability in the longer term. That opportunity was not taken. This is unfortunate, and the response of the Court rather ambiguous.

With regard to the definition of the economic activities and the existence of a “well established practice”, the response of the Court is in the negative, as it first states that those requirements “*are not absolute*”⁵⁰ and then better articulates that “*the General Court did not impose specific requirements with regard to the nature of the evidence with which it may be demonstrated that a rational private investor in a situation as close as possible to that of the public undertaking would have made the capital contribution at issue*”.⁵¹ Does this mean that the applicability of those two requirements must be confined to the case at issue and the like? The answer is probably yes, as the Court held that “*in some circumstances, they may help to identify a private investor comparable to the public undertaking to which the private investor test is applied*”.⁵² As to the “reasonable probability” of reaping an economic benefit in the longer term, the Court does not tackle the question as to whether this standard would impose a disproportionate burden of proof on the Commission. On the contrary, it restricts itself to stating that the long-term rationale behind the French State’s behaviour is not sufficiently demonstrated by the mere statement that the State’s brand image would be affected due to social problems.

The reason why the Court of Justice felt prevented from endorsing the general applicability of the legal framework devised by its lower court, as to the conduct of public holding companies

⁴⁹ For the traditional paradigm, see P. Nicolaides and I. E. Rusu, *Private investor principle: what benchmark and whose money?*, (2011) EStAL, vol. 10, n. 2, 237-248.

⁵⁰ ECJ Judgment, para 36.

⁵¹ ECJ Judgment, para 37.

⁵² ECJ Judgment, para 36. It is not easy to understand how the need to prove that the adoption of the state measure concerned is a “well established practice” might help to identify the reference private investors. As it has been explained above, this assessment assumes that the private investors to which the behaviour of the State has to be compared has already been found.

or large public groups of undertakings, is rather unclear. Admittedly, the evidence required by the framework appears to impose strict boundaries on the relevance of non-economic concerns, so enabling the Commission to ascertain the existence of a long-term economic rationale of the measures taken by those public entities.

As to the geographic and sectoral definition of State economic activity targeted by the State measure, it should be pointed out that the reference private investor must be “of a comparable dimension” to that of the public body concerned.⁵³ In this context, the definition of the geographic and sectoral dimension of the economic activity undoubtedly helps to determine the size of that private investor. As a result, it is also a necessary precondition to determine the existence of a “well-established practice” or “reasonable probability” of gaining an indirect material profit. Why then should it not be regarded as an essential step of a newly introduced reasonable investor test?

In the same vein, the implicit refusal to elevate the “well-established practice” to the rank of a fundamental element of that test raises questions. As rightly noted by the Advocate General,⁵⁴ the proof of the existence of a settled practice in the market does not constitute a new requirement in the context of MEIT assessment. The 1993 Communication already explained that State resources are to be classified as aid where they do not constitute “a genuine provision of risk capital *according to usual investment practice in a market economy*”.⁵⁵ If the State measure pursuing a short-term non-economic concern is squared with a settled practice of the private sector, there should be no further need to prove its economic rationale. Finally, the “reasonable probability” of achieving a profit in the longer term may plausibly be deemed as a standard of proof that the Commission must satisfy whenever it applies the reasonable investor test. This requirement reflects the degree of risk that a private actor is ready to accept, as the 1993 Communication seems to confirm, by stating that the only projects not complying with the private investor test are those where there are “no objective or bona fide grounds *to reasonably expect an adequate rate of return* in a comparable private undertaking”.⁵⁶

As the above analysis reveals, in the appeal judgment the Court seems unwilling to restrict the degree of discretion *de facto* enjoyed by the Commission in the evaluation of the conduct of public holdings and large public group of undertakings. This is rather surprising, as the most recent case law of the Court has gone in the opposite direction. The *EDF*⁵⁷ and *ING*⁵⁸ rulings have indeed recognised the need for increased legal certainty⁵⁹ by determining both

⁵³ Italy and *SIM 2 Multimedia v. Commission*, cited *supra*, note 2, para 38.

⁵⁴ Opinion, para 56.

⁵⁵ 1993 Communication, cited *supra* note 29, para 14.

⁵⁶ 1993 Communication, cited *supra* note 29, para 28.

⁵⁷ Case C-124/10 P, *Commission v. Électricité de France (EDF)*, EU:C:2012:318.

⁵⁸ Case C-224/12 P, *Commission v. Netherlands and ING Groep NV*, EU:C:2014:213.

⁵⁹ Legal certainty has never been explicitly analysed in relation to the notion of State aid. The only significant contribution concerns the compatibility assessment. See P. Nicolaidis, *Legal Certainty and the EU System of State Aid Control*, in *Scrutinizing the External and the Internal Dimension of European Law - La dimension externe et interne du droit européen à l'épreuve*, Liber Amicorum Paul Demaret (Lang, 2012), p. 603. However, the lack of reflection on this point is offset by the fruitful debate on the type of judicial review to be exercised by the European judges in competition cases. See, in particular, J. Derenne and M. Merola, *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conference Series (Bruylant, 2012), pp. 203-248.

the procedural steps to be followed and (partly) the substantive content of the MEIT assessment.⁶⁰ In particular, the Court seems here to worry about the consequences of imposing on the Commission what would be, in its view, an excessive burden of proof. This concern is not commendable, according to the present author, especially if one considers the new procedural instruments made available to the State aid watchdog as a result of the entry into force of the amended Procedural Regulation.⁶¹

One final – though most significant – remark: the extremely restrictive approach taken by the Court towards the use of protection of the brand image of the State as a global market investor, as a justification of the long-term rationale of the French State’s measure, should be welcomed. The Advocate General properly explained that the concerns raised by Member States in that regard are “*very far from those of a public investor*” and “*the prospects of viability of the undertaking benefiting from the state measure plays no part whatsoever in those considerations*”.⁶² Imperatively, this is the limit of any possible application of the MEIT to long-term investments. The economic benefit pursued must be carefully described, while the acceptance of the mere reference to an economic damage potentially suffered by the Member State as an indivisible entity would seriously jeopardise the effectiveness of State aid control.

VII. Conclusion

Fearing the considerable implications of saying a clear word on the legitimacy of taking into account non-economic concerns in the application of the private investor test, the Court of Justice decides not to decide. On the one hand, to refuse the conclusion drawn by the General Court on the basis of Article 3(3) TEU would be very likely to drastically reduce the number of long-term investments complying with the MEIT. As a result, long term investments would go on being approved at the stage of compatibility in most cases, in stark contrast with the provision of the 1993 Communication that no discrimination must be made between projects having short and long-term pay-back periods.⁶³ On the other hand, to open the doors of the private investor test to non-economic concerns would carry the danger of blurring the distinction between the scope of the prohibition and its justification, in such a way as to enable the Member State to escape systematic review of its national measures, by pleading mere policy-related motives. This is true unless, it is submitted, a sufficiently rigid legal framework is imposed in order to condition the use of those arguments upon the provisions of sufficiently convincing evidence. The outer boundary of this framework is upheld by the Court of Justice: a public subsidy cannot be justified on the sole ground of the protection of a State interest should this interest not be defined further. This is commendable, but not enough

⁶⁰ See, in this respect, A. Biondi, *State aid is falling down, falling down: an analysis of the case law on the notion of aid*, 50 CML Rev. [2013], 1719-1743, at 1740 and 1741.

⁶¹ Council Regulation (EU) No 734/2013 of 22 July 2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [OJ L 204, 31.7.2013, p. 15-22]. In particular, the new Article 6a (6) and (7) empowers the Commission to request market participants to provide information and to impose sanctions or periodic penalty payments for non-compliance (“Market Information Tool”).

⁶² Opinion, para 94.

⁶³ This is the argument developed in N. Khan and K. Borchardt, *The Private Market Investor Principle: Reality Check or Distorting Mirror?*, in EC State Aid Law – Les droit des aides d’Etat dans la CE, Liber Amicorum Santaolalla Gadea (Wolters, 2008).

to make the appeal ruling satisfactory. By contrast, reason is not given as to why the requirements of the legal framework laid down by the General Court (i.e. sectoral and geographical analysis of the economy activity targeted by the state measure, well-established practice among the comparable private actors and reasonable probability of obtaining an indirect material profit) are not deemed to be of general applicability. It is hoped that future rulings will bridge this gap in the application of the private investor principle.